

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1422

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

-against-

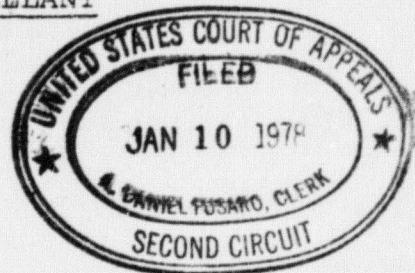
DENNIS W. MULLIGAN,

Appellant.

Bqs

Docket No. 77-1422

REPLY BRIEF FOR APPELLANT



GOLDBERGER, FELDMAN & BREITBART
Attorneys for Appellant
401 Broadway Suite 306
New York, N. Y. 10013

MICHAEL YOUNG, ESQ.
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

-against-

Docket No. 77-1422

DENNIS W. MULLIGAN,

Appellant.

REPLY BRIEF FOR APPELLANT

Appellant Mulligan submits the following arguments in response to certain claims made by the Government in its brief in this appeal.

Point I

In Point I of his main brief, appellant argued that he was denied constitutional and statutory rights by the prejudice, misconduct and incompetency of juror Stephenson. Specifically, he cited proof of her assault on a postal employee, her arrest, confinement and arraignment by New York City police for that assault, her criminal and civil court proceedings, her perjured testimony in civil court, her mental instability, her concealment of information during jury voir dire, her infatuation with the prosecutor in this case, her preoccupation with her own mental problems during the trial below, and her hopes to capitalize financially on appellant's conviction, as evidence that she was unqualified to serve as an impartial juror in this case. The Government, ignoring most of these disqualifying

factors, confines its brief largely to an argument that appellant is not entitled to a new trial unless he establishes that juror Stephenson intentionally concealed information about her arrest during the voir dire below (See Government's brief at 10-38). Even on that issue, the Government is in error. Where material facts about a potential juror were not available to the defense during jury selection, the controlling question is whether that information established that the defendant was deprived of his right to a fair trial by an impartial jury (See appellant's brief at 18-19). Alternatively, the court must decide whether the unavailability of that information during jury selection deprived the defense of its right to make an informed decision as to challenges (See appellant's brief at 19-20). Evidence that a juror intentionally concealed such information during voir dire is relevant in that it provides further proof of that juror's bias. Appellant submits that such proof is provided in this case by the substantial evidence that juror Stephenson willfully concealed the fact of her felony assault arrest during voir dire. However, evidence of juror bias requires a new trial, regardless of whether the non-disclosure of that evidence during voir dire was "intentional or inadvertent." See, e.g., Jackson v. United States, 395 F.2d 615 (D.C.Cir.,1968); Brown v. United States, 356 F.2d 230, 233 (10th Cir.1966). Moreover, the question of whether appellant was denied his constitutional and statutory rights must be decided upon consideration of all of juror

Stephenson's disqualifications, not merely those which the government chooses to address. Clearly, it was not merely Ms. Stephenson's arrest and her adverse experiences with the New York City police, but also her mental instability, prior perjury, and other factors cited by appellant which all combined to deny appellant the fair trial to which he was entitled.

The Government is also in error in claiming that juror Stephenson's post trial letter to the prosecutor is not competent evidence (Government brief at 22-23). To the contrary, that letter, as proof of this juror's bias, misconduct and mental instability, was both relevant and admissible. As this and other circuits have repeatedly noted:

The federal courts do not adhere to a rule of strict exclusion of testimony by a juror in impeachment of his own verdict. McDonald v. Pless, 238 U.S. 264, 268-69, ... (1915); Mattox v. United States, 146 U.S. 140, 148, ... (1892); Government of Virgin Islands v. Gereau, 523 F.2d 140, 148-49 (3d Cir. 1975); Klimes v. United States, ... 263 F.2d 273, 274 (1959); Jorgenson v. York Ice Machinery Corp., 160 F.2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764... (1947).

See, also, United States v. Green, 523 F.2d 229 (2d Cir.), cert. denied, 423 U.S. 1074 (1975); Butler v. United States, 317 F.2d 249 (8th Cir.), cert. denied, 375 U.S. 836 (1963). As expressly provided by Rule 606(b) of the Federal Rules of Evidence, a juror's own statements are competent to show that that juror was improperly

affected by some "outside influence." A juror's prior experiences, mental instability and/or expressions of bias outside the jury room have traditionally been held to be outside influence, concerning which the juror's own statements are competent evidence. See, e.g., Remmer v. United States, 350 U.S. 377 (1956); Jackson v. United States, 395 F.2d 615 (D.C.Cir.1968); United States ex rel. DeVita v. McCorkle, 248 F.2d 1, 5 (3d Cir.) cert. denied, 355 U.S. 873 (1957); Wright v. Bernstein, 129 A.2d 19, 24 (N.J.1957); see also, United States v. Dioguardi, 492 F.2d 70 (2d Cir.1974). It is particularly curious that the government should cite Dioguardi in support of its claim that a juror's statements are not competent evidence (Government brief at 23). Although this Court affirmed the conviction in that case, it indisputably considered the juror's post-trial letter in determining whether that juror has been competent. It is also significant that juror Stephenson's letter was clearly unsolicited, thus eliminating the possibility that it was induced or manufactured by a dissatisfied defendant. Compare Mattox v. United States, 146 U.S. 140, 148 (1892); United States v. Wilson, supra, 534 F.2d at 378. Thus, both the government and the Court below were in error in refusing to consider juror Stephenson's letter on this issue.

A number of other inaccurate or misleading statements in Point I of the Government's brief merit only brief response. Thus, the Government cites United States v. Brasco, 516 F.2d 816, 819 n.4 (2d Cir.) cert. denied, 423 U.S. 860 (1975) as standing for the "settled principle that a post-trial interrogation [of a juror] such as that involved here should be conducted by the court and not by counsel." (Government's brief at 19 fn.) In fact, Brasco contains no such holding. Rather, it states only that the questioning of the juror should take place under the court's "supervision and control," as opposed to the defense attorney's offices or elsewhere. The advantages of in-court examination of the juror by counsel is nowhere better demonstrated than in this case, where the court, by precluding any inquiry but its own, failed to elicit anything beyond a self-serving denial of bias by the juror in question.

The Government's suggestion that defense counsel acted improperly in conducting a background investigation of juror Stephenson after her letter was received (Government brief at 36) is disingenuous at best, since the government is well aware that defense counsel was granted permission to conduct such an investigation in this case. The government's assertion that "defendant's original motion [to set aside the verdict] had been premised upon a misleading and highly incomplete account of the relevant background" (Government brief at 19, fn.) is equally dishonest, since all of the facts set forth in that

motion (appendix at 226) were later confirmed in the government's own papers (appendix at 242).

The government, in arguing that juror Stephenson was legally justified in failing to disclose her prior arrest at voir dire, cited CPL 160.60 as standing for the proposition that such an arrestee against whom charges are dismissed shall not "be required to divulge information pertaining to the arrest or prosecution." (Government's brief at 20). In fact, the statute specifically provides that such non-disclosure is not authorized when the request for the information comes from a "superior court." Since the federal district court which conducted the jury voir dire in this case was clearly a "superior court", Ms. Stephenson's non-disclosure was not legally authorized under CPL 160.60 or any other statute.

Finally, the government's assertion that "the defense never asked to have the panel of prospective jurors questioned about prior arrests" and demonstrated an "evident lack of interest in such matters during the voir dire" is offensively misleading. Obviously, counsel reasonably believed that arrests such as Ms. Stephenson's would be described in response to the court's inquiry of every prospective juror as to whether they had "ever been involved in a criminal proceeding." In light of the government's claim, this Court is urged to examine the voir dire minutes, which contain ample evidence of defense counsel's concern for this issue (see appellant's main brief at 20-21). Similarly,

the court should not take seriously the argument by the government that persons such as Ms. Stephenson who have been arrested or charged with a crime "are universally considered to be ideal defense jurors." (Government brief at 28). Whatever the validity of that assumption in a normal case, it certainly does not hold true in a case where the defendant is himself a police officer.

Point II

In Point II of his brief, appellant Mulligan claims that it was error for the court below to allow the government, in presenting evidence as to the perjury counts in the indictment, to extract and introduce into evidence only those answers from appellant's grand jury testimony which were alleged to be perjurious. The court repeatedly refused defense counsel's request that the statements be presented in the context of appellant's other grand jury testimony.

Appellant wishes to call to this Court's attention the fact that not one of the cases cited by the government for the proposition that such extraction is proper was a perjury prosecution. United States v. Capaldo, 402 F.2d 821, 824 (2d Cir.1968), cert. denied, 394 U.S. 989 (1969) (bank robbery); United States v. Rosenblum, 339 F.2d 473, 475 (2d Cir.1964) (mail fraud); United States v. Kravitz, 281 F.2d 581, 587 (3d Cir.1960), cert. denied 364 U.S. 941 (1961) (income tax evasion); United States v. Johnson, 165 F.2d 42, 48 (3d Cir.1947),

cert. denied, 332 U.S. 852 (1948) (obstruction of justice). (Government's brief at 38-39). In most of those cases, the truthfulness of the proffered testimony was not even at issue. Obviously, in a case such as the present, where the question of the truthfulness of the testimony is central, forming the very basis for the criminal charge, the context in which that testimony was given can become critically important to the resolution of that issue. Appellant submits that for the reasons set forth in his main brief on this issue, depriving the jury of that context was error which denied appellant a fair consideration of this charge.

Appellant also submits that the government's characterization of the grand jury testimony as hearsay (government's brief at 38, 41) is incorrect. As Rule 801(c) of the Federal Rules of Evidence plainly states, statements are hearsay only when "offered in evidence to prove the truth of the matter asserted." Here, the remainder of appellant's grand jury testimony was not being introduced to prove the truth of what appellant asserted in that testimony. To the contrary, it was being introduced because its truthfulness was proven by other evidence at trial, principally evidence introduced and/or uncontradicted by the government (see appellant's main brief at 35-37). Alternatively, the remainder of the testimony was admissible to show the context in which the challenged portions were given (see appellant's main brief at 37-8). As such it was not hearsay.

CONCLUSION

FOR THE ABOVE-STATED REASONS, AND THE
REASONS SET FORTH IN APPELLANT'S MAIN
BRIEF, THE VERDICT SHOULD BE SET ASIDE
AND THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Appellant

MICHAEL YOUNG, ESQ.
Of Counsel

COPY RECEIVED
ROBERT B. FICKLE JR.
JAN 25 1968
U. S. ATTORNEY
SO. DIST. OF N. Y.